In the High Court of Judicature at Madras

Dated: 08/07/2003

Coram

The Honourable Mr.Justice R.Jayasimha Babu
and
The Honourable Mr.Justice S.R.Singharavelu

Habeas Corpus Petition No.2253 of 2002

Rani ..... Petitioner

-Vs-

1. State of Tamil Nadu, rep. by its
Secretary to Government,
Prohibition & Excise Department,
Fort St. George, Chennai 600 009.

2. The District Collector-cum-District
Magistrate, Dharmapuri District,
Dharmapuri. ..... Respondents

Petition filed under Article 226 of the Constitution of India for the issue of writ of habeas corpus to call for the records in S.C.No.97 /2002 dated 25.09.2002 on the file of the second respondent and quash the same as illegal and direct the respondents to produce the detenu Kattan alias Pachiayappan, son of Govindan before this Court and set him at liberty.

For Petitioner : Mr.R.Sankarasubbu

For Respondents : Mr.A.Navaneethakrishnan,
Additional Public Prosecutor

:ORDER

(Order of the Court was made by
R.Jayasimha Babu, J.)

The District Magistrate and the District Collector, Dharmapuri District, on 25.09.2002 made an order directing the detention of Kattan alias Pachiayappan, male, aged 33 years, under the Tamil Nadu Act 14 of 1982, on the ground that he is a bootlegger whose activities are prejudicial to the maintenance of public health and maintenance of public order.

2. The legality of the detention of Kattan alias Pachiayappan has been called into question by his wife in this petition.

3. At the outset it was submitted that the order of detention that was made is not lawful as a representation sent by the petitioner on 09.09.2002 after the arrest of Kattan alias Pachiayappan on 23.08.20 02 in which she had expressed apprehension that Kattan is likely to be detained under this enactment, has not been considered. In that representation she had also stated that on 23.08.2002 her husband has been arrested in respect of crime No.481/02 and remanded to custody and that bail application filed on his behalf had been dismissed. The further statement made in that representat ion was that the complaint said to have been given to the Tahsildar in which it has been allegedly stated that the petitioner and her husband had amassed wealth by their bootlegging activities, was not true and that they were living in a rented premises and had not amassed wealth. That representation ended with a prayer to the authority to stop the proposed detention of the said Kattan under the Goondas Act.

4. The District Magistrate who has filed the counter affidavit has stated that the petitioner had presented that representation on a public grievance day on 09.09.2002 and that it had been sent to the Superintendent of Police with a direction to give reply within 30 days and that the detaining authority was not aware of the petition that had been submitted by the petitioner as she had not met the detaining authority on 09.09.2002 or subsequently. He has stated that he was " never aware of the fact that advance petition has been presented in the instant case while passing the detention order."

5. Learned counsel for the petitioner submitted that once the receipt of the representation is established, the burden is entirely on the respondent to show that such representation had, in fact, been considered before the order of detention was made, and as the authority has admitted total ignorance of such a representation having been filed before the detention order was made, it is evident that this representation has not been considered. Counsel further submitted that such non consideration has resulted in the authority not applying his mind to materials which were relevant and his having failed to consider this representation has rendered the detention order liable for being struck down on the ground of non application of mind.

6. That submission raises the question as to whether the prospective detenu or anyone-else acting on his behalf has a right to make a representation even before the detention order is made to the detaining authority, and if so, whether such representation, if made, is one which the authorities are under the duty to consider and as to what would be the consequence of non consideration?

7. Article 22 of the Constitution which permits preventive detention does not impose an obligation on the detaining authority, nor does it confer a right on the prospective detenu to make a representation even before the detaining authority decides that the detention of the person is required in terms of the law which confers power on the authority to make orders of detention. 'Representation' is referred to only in Article 22(5). That sub article reads as under:

"Article 22(5):

When any person is detained in pursuance of an order made under any

law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

8. The right to represent conferred by Article 22(5) is against the order made under any law providing for preventive detention. The Constitution does not guarantee a right to make a 'representation', per se, to any person before the order of detention is made with regard to an order of detention which is yet to be made.

9. However, what the law does require is that the subjective satisfaction of the detaining authority be based upon objective, relevant material, that relevant material is not taken into account, and that no relevant and material fact brought to it's notice prior to the execution of the order of detention, is kept away from consideration.

10. In the case of Additional Secretary to Government of India vs. Alka Subhash Gadia, (1992) Supp (1) SCC 496, the apex Court has held that the detenu who has not submitted to the order of detention is not entitled to the detention order and the grounds of detention. This would imply that the right to make a representation with regard to the detention order is at a time subsequent to the submission of the detenu to the order and not at any time prior thereto.

11. The Supreme Court in the case of Ashadevi vs. K.Shivraj, AIR 19 79 SC 447, inter alia, held thus:
"It is well settled that the subjective satisfaction requisite on the part of the detaining authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order."

12. In the case of Ayya vs. State of U.P., AIR 1989 SC 364, it was held, "There would be vitiation of the detention on grounds of nonapplication of mind if a piece of evidence, which was relevant though not binding, had not been considered at all. If a piece of evidence which might reasonably have affected the decision whether or not to pass an order of detention is excluded from consideration, there would be a failure of application of mind which, in turn, vitiates the detention."

13. In the case of District Magistrate vs. R.Kumaravel, 1994 SCC Cri 229, the Court considered a case where prior to the detention, a telegram had been sent to the detaining authority alleging the arrest of the detenu prior to the occurrence of the ground incident. The Court held that the authority had no duty to consider such telegram unless the telegram was confirmed by a subsequent signed application, representation or an affidavit, as the contents of the telegrams had no authenticity at all and the same could not be taken into consideration for assessing the value of the other authentic documents on record. The Court in that case also found that the information sought to be

conveyed in the telegram had been incorporated in a bail application which had been considered by the detaining authority before making the order of detention.

14. In the case of Kumaravel, 1994 SCC (Cri) 229 as also in the case of Ayya, AIR 1989 SC 364, and also in the case decided by this Court in Syed Ali vs. State, 1999-II-CTC-496, what had been sought to be conveyed to the detaining authority was that the alleged detenu was in custody and not at the scene when the occurrence in which he was an alleged participant, had occurred. It was in that context that it was held by the Court that the information which may reasonably affect the subjective satisfaction of the authority should be considered by the detaining authority, even when such information is conveyed to the authority by or on behalf of the detenu prior to the making of the order of detention.

15. It is not every representation made by or on behalf of the prospective detenu that would entitle the detenu to contend that non consideration of such a representation before passing the order of detention vitiates the order of detention.

16. The learned Additional Public Prosecutor contended that the prospective detenus get wind of the preparatory work being made for their detention and submit a representation which may or may not have any bearing on the decision as to whether he should or should not be detained, submit such representations on a public grievance day, and thereafter contend that it's non-consideration by the detaining authority vitiates the order of detention. Counsel submitted that it is physically not possible for the detaining authority to ensure that all such representations made on the grievance days are brought before the detaining authority immediately and before the detention order is made.

17. The submission so made is not the one which can be accepted. The rights guaranteed to the citizens of the country can be interfered with only in accordance with law. The constitutional safeguards are to be all the more scrupulously observed. Administrative difficulties and lack of efficiency can be no answer to justify the breach of the rights guaranteed by the Constitution.

18. It is for the bureaucracy to reorganise itself and evolve procedures that will ensure that things required to be done by appropriate authorities in matters concerning preventive detention are brought to their notice immediately and any communication in that regard sent by anyone having a right to make the same, is considered as expeditiously as possible by assigning to it priority over other things required to be done by that authority.

19. We are rather surprised that the detaining authority should have stated that he was wholly unaware of the representation that had been given to his office on a public grievance day. The whole idea of having a public grievance day is to enable persons with a grievance to communicate their grievance to those in authority, and if those authorities do not even read and

remain ignorant of the contents of a representation setting out the grievance, the holding of grievance day or having a public grievance redressal cell will amount to little. Matters which require priority should be given priority and may not be handled in a routine manner.

20. The question that remains for consideration is as to whether the facts set out in the representation given by the petitioner were such as to have had any possible impact on the mind of the detaining authority whose subjective satisfaction based on objective and relevant data is the foundation for the order of detention.

21. The representation made here is not to the effect that the detenu had not taken part in the ground incident or that he was not guilty of the offence with which he was charged. The representation was only regarding an allegation made by the villagers in some petition given to the Tahsildar that the detenu and his family had accumulated wealth by their bootlegging activities. The detaining authority has not relied upon any representation given to the Tahsildar nor has he made any reference to the wealth possessed by the detenu. For the purpose of deciding as to whether the detenu was a bootlegger and further as to whether his activities were prejudicial to the maintenance of public health, what was stated in that representation was not in any way material or relevant. The non consideration of the contents of the representation, in the circumstances, does not vitiate the order of detention.

22. It was next submitted that a bail order made on 24.09.2002 much prior to the date of detention order, which bail order had imposed certain restrictions, had not been considered properly by the detaining authority. The submission was that the detenu had been directed to report to the police every day for 60 days and that the non consideration of that restriction had the effect of invalidating the order of detention.

23. In the recent decision of the apex Court in the case of K. Varadharaj vs. State of Tamil Nadu, 2002 SCC (cri) 1514, the Court after referring to the well known decision of the apex Court in the case of Abdul Sathar Ibrahim Mani vs. Union of India, (1992) 1 SCC 1, held, "it is clear that placing of the application for bail and the order made thereon are not always mandatory and such requirement would depend upon the facts of each case."

24. Non consideration of the specific conditions subject to which bail has been granted would be material only if it can be said that consideration of those conditions was material for the purpose of deciding as to whether detention was to be ordered. The requirement of reporting to the police everyday for sixty days was not a factor which can be regarded as being material and relevant while considering the need for preventive detention in the light of the past conduct borne out by the adverse cases and the ground case, and the reasonable belief based on that past conduct, that if not detained, the detenu would indulge in similar acts in the near future.

25. In this context, learned counsel for the petitioner invited our attention to the decision in the case of M.Ahamedkutty vs. Union of India,

1990 SCC (cri) 258. That case was considered by the apex Court in the case of K.Varadharaj vs. State of Tamil Nadu, (2000) 6 SCC 7 35, which makes abundantly clear that mere non consideration per se would not impair the detention order but depends on the circumstances of a given case.

26. In this case the detention order was made on 25.09.2002. The bail order was passed by the High Court on 24.09.2002. The detenu was in jail on 25.09.2002 as he had not been let out on bail pursuant to the bail order made on 24.09.2002. The detaining authority was quite right in stating that the detenu was in custody. He was also right in the opinion that he had formed that the detenu was likely to obtain the bail in case he files an application. The restrictions placed while granting bail that he should report to the police every day would have no impact at all on the question as to whether his detention was required, having regard to his past conduct and past record.

27. Moreover, copy of the order made on the bail application on 24 .09.2002 was not available to the detaining authority who made the detention order on 25.09.2002. The non consideration of the order made on the bail application on 24.09.2002, in the circumstances, cannot be said to be vitiate the order of detention.

28. Counsel then submitted by placing reliance on the decision of the apex Court in the case of State of Tamil Nadu vs. Senthil Kumar, (1999) 2 SCC 646, that supply of remand extension order subsequent to the detention without a covering letter had the effect of adversely affecting his right to make an effective representation. Additional Public Prosecutor points out that the sponsoring authority had, in fact, filed a further affidavit while producing the document. There is therefore no substance in the submission made for the petitioner. The prosecutor further submitted that the sponsoring authority's affidavit need not be supplied to the detenu, as has been consistently held by the Supreme Court from 1984 onwards.

29. With regard to the alleged delay in disposing of the representation, the representation was received by the Government on 23.10.200 2. On 24.10.2002 it called for remarks from the detaining authority. The remarks reached that authority on 28th. That authority in turn called for the remarks from the sponsoring authority. The sponsoring authority prepared his report on 30th without any undue delay. He seems to have sent it by post and that reached the office of the detaining authority on 5th November, the 2nd, 3rd and 4th of November, being public holidays. Immediately after the receipt of the sponsoring authority's remarks the detaining authority sent his report to the Government which the Government received on the following day on the 6th November. Thereafter the matter was proceeded with without any loss of time and final decision was taken by the Minister on 12th November, the file having been put up to the Secretary on 8th. 9th and 10th November were holidays.

30. Counsel submitted that even the delay of four days would be fatal and referred to the case of Rajammal vs. State of Tamil Nadu, (199 9) 1 SCC 417. That was a case where a Minister who was the authority competent to

decide finally on the representation had not done so for a period of over four days and there was no explanation at all forthcoming. The Supreme Court in the context in the facts of that case held that it was not permissible for the Ministers to keep the file with them and not decide on the same and without also stating the reasons for the file not being dealt with in the meantime.

31. Here there has been really no default on the part of the Minister. He has acted with reasonable promptitude. The representation had to pass through different levels. Calling for the remarks from the detaining authority and he in turn calling for the remarks from the sponsoring authority cannot be said to be contrary to any law. Calling for such remarks was to enable the Government to inform itself comprehensively with regard to what had been stated in the representation.

32. Even though the Government may be entrusted with numerous responsibilities, nevertheless, when it chooses to detain persons without trial, it must necessarily give priority to matters arising under enactments relating to preventive detention. Such priority has been given in this case.

33. About the quantum of time required for considering the representation sent by or on behalf of detenus, there is no set formula. The only standard and guidance is reasonableness thereof in the given circumstances. There is no inflexible rule that the delay of four days will result in the order of detention falling to the ground. Delays which are satisfactorily explained do not vitiate the detention. While apparently small but unexplained delay may prove fatal to the order of detention, delays which appear to be long, but are satisfactorily explained would not.

34. The habeas corpus petition is dismissed.

Index : Yes
Web : Yes

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Copies to

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State of Tamil Nadu,
Prohibition & Excise Department,
Fort St. George, Chennai 600 009.

2. The District Collector-cum-District
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